

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

CROP HAIL MANAGEMENT INC,

Debtor.

Case No. **03-61901-7**

RICHARD J SAMSON,

Plaintiff.

-VS-

**FLATHEAD TRAVEL SERVICES INC,
and ALL ABOUT TRAVEL, INC.,**

Defendants.

Adv No. **05-00084**

MEMORANDUM OF DECISION

At Butte in said District this 20th day of January, 2006.

On November 18, 2006, Defendant, All About Travel, Inc., filed a Fed.R.Civ.P. 12(b)(6) motion to dismiss, doc. # 19, this adversary proceeding as it relates to the allegations asserted

against it in Plaintiff's First Amended and Substituted Complaint. Plaintiff responded to the motion to dismiss and requested a hearing for January 12, 2006, at 10:00 a.m. At the scheduled hearing on January 12, 2006, James H. Cossitt, of Kalispell, Montana, represented Plaintiff; Harold V. Dye, of Missoula, Montana, represented Defendant All About Travel, Inc. Neither party offered any exhibits for admission or provided any witness testimony. The attorneys made brief legal arguments. The Court took this contested matter under advisement, which is now ripe for decision.

FACTS

Flathead Farm Mutual Insurance Company filed this involuntary bankruptcy case against Debtor on June 10, 2003. The Court entered an order for relief on July 9, 2003. The chapter 7 trustee filed this adversary proceeding on July 1, 2005. After leave was granted, on September 14, 2005, Flathead Travel Services, Inc., filed an amended answer (docket # 12) in which it first raised the defense that it was a "mere conduit" (Eighth Affirmative Defense), asserting that a third party may be the real party in interest. After leave was granted, Plaintiff filed its amended complaint on October 13, 2005, and added Defendant All About Travel, Inc. On October 21, 2005, Plaintiff had the Clerk reissue a summons for service on All About Travel, Inc. On October 24, 2005, Plaintiff returned the reissued summons after having served All About Travel, Inc., by first class mail. On November 18, 2005, Defendant All About Travel, Inc., filed its motion to dismiss.

CONTENTIONS

Plaintiff contends that the amended complaint and summons adding All About Travel, Inc., relates back to the original filing date of July 1, 2005, and is within the statutory time

limitation required under 11 U.S.C. § 546. Defendant contends that the amended complaint as to Defendant All About Travel, Inc., should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that said amended complaint is time-barred under 11 U.S.C. § 546(a) and contends that the relation back allowed under F.R.B.P. 7015 does not apply as the amended complaint and the addition of All About Travel, Inc., does not involve a misnamed defendant but rather involves an additional party. Defendant contends that the addition of All About Travel, Inc., was beyond the statutory time limitation.

DISCUSSION

Pursuant to 11 U.S.C. § 546(a)(1), an avoidance action by a trustee must be commenced after the earlier of (1) the later of (A) two years after the entry of the order for relief, or (B) one year after the appointment of the first trustee if the trustee appointment occurs before the two year period expires, or (2) the time the case is closed or dismissed. The Court entered the order for relief on July 9, 2003. Plaintiff filed this adversary proceeding against Flathead Travel Services, Inc., on July 1, 2005, within the two year period of § 546(a)(1)(A). Subsequently on or after September 14, 2005, Plaintiff learned of a third party that may be an initial transferee involved in the alleged avoidance action. Plaintiff filed the amended complaint on October 13, 2005, and reissued a summons for the alleged initial transferee, All About Travel, Inc., on October 21, 2005, which was served by mail on October 24, 2005. The 120-day period required by Fed.R.Civ.P 4(m), incorporated by reference in F.R.B.P 7004(a)(1), expired on October 29, 2005 [July 1, 2005 through October 29, 2005].

F.R.B.P. 7015 incorporates Fed.R.Civ.P. 15. Fed.R.Civ.P. 15(c)(3) specifically applies to the issues argued by the parties and provides:

(c) An amendment of a pleading relates back to the date of the original pleading when

* * *

(3) An amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper person, the action would have been brought against the party.

The provisions of (2) are satisfied as the amended complaint asserts the same allegations as in the original complaint and that they arise out the same conduct, transaction, or occurrence. Within the 120-day period provided by Rule 4(m), the added party has received notification of the institution of the action and no evidence exists in the record that the added party, All About Travel, Inc., will be prejudiced in maintaining a defense to the allegations on the merits. Further, no evidence exists in the record that All About Travel, Inc., did not know or should not have known that but for the mistake concerning its identity which was disclosed by an affirmative defense in the amended answer filed after the two year period of §546, that the action would have been filed against it within the 120-day period. As noted by Judge Adler in *Arthur v. Schurek* (*In re Schurek*, 139 B.R. 512, 515 (Bankr. S.D.Cal. 1992) (a misnomer case), “the 1991 version of Rule 15(c) can have the effect of extending the statute of limitations to the end of the period for serving a summons and complaint provided by Rule 4[m] – currently 120 days.” By a footnote, Judge Adler further stated that this conclusion is only true “when the statute of limitations runs between the date of filing and the end of the period specified by Rule 4[m]. This Opinion does not address the case in which the statute of limitations runs after the Rule 4[m] period.” *Id.*

District Judge Silver, in *Brink v. First Credit Resources*, 57 F.Supp.2d 848, 853-858 (D.Ariz. 1999) (an additional party case), comprehensively discusses the notice and mistake provisions of (A) and (B) of Rule 15(c)(3). In the case *sub judice*, no issue arises that All About Travel, Inc., did not have actual notice of the action within 120 days of the original filing of the complaint. Service on All About Travel occurred on October 24, five days before the 120-day period expired on October 29, 2005. As to mistake, Plaintiff in the case *sub judice* only discovered the existence of a third party after the originally named Defendant, Flathead Travel Services, Inc., identified that a third party may be an initial transferee. Immediately upon learning of the existence of a third party, Plaintiff moved to amend to add All About Travel, Inc. Based upon the pleadings, the motion and response, the information available indicates that Plaintiff did not know about All About Travel, Inc. until after the statutory time limitation of § 546, but did learn of the name within the 120-day period of Rule 4(m). Based upon the foregoing, the Court concludes that Plaintiff satisfies the requirements of F.R.B.P. 7015(c)(3) and the allegations of the amended complaint adding Defendant All About Travel, Inc., relate back to the date of the filing of the original complaint.

As discussed in 6A C. Wright & A. Miller, *Federal Practice and Procedure* § 1498 at 24 (Supplement 2005, to 2nd ed. 1990),

Rule 15(c) was amended in 1991 to change the result required under [*Schiaone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379 (1986)], which is discussed in the main volume, with respect to relation back and a misnamed defendant. As now set forth in a new subsection (c)(3), if the party to be added received notice of the institution of the action within the period provided for service under Rule 4 so as not be prejudiced in maintaining a defense, and knew or should have known that but for a mistake concerning the identity of the proper party, the action would have named that party, relation back is proper. Thus, the notice required under the rule no longer is tied to the governing limitations period, but is linked to the

federal service period of 120 days or any additional time resulting from a court-ordered extension.

See also Centuori v. Experian Information Solutions, Inc., 329 F.Supp.2d 1133, 1137-1141 (D. Ariz. 2004) (Defendant added after statute of limitations expired but within the 120-day period when plaintiff discovered additional defendant through discovery after original complaint was filed that plaintiff by mistake, and not by strategic decision, had not named.); *Precise Exercise Equipment, Inc., v. Kmart Corp.*, 59 U.S.P.Q.2d 1566, 1568-69, 2000 WL 33417506 (D.C.D. Cal. 2000) (Defendant added after statute of limitations expired and after 120-day period when defendant within the 120-day period of Rule 4(m) clearly had notice of the litigation and knew that but for Plaintiff's mistake as to the manufacturer of some exercise equipment it would have been named in the original complaint even though plaintiffs learned of defendant within 120-day period.).

Defendant All About Travel, Inc, also moved to set the trial in this proceeding at a date and time certain, (doc. # 22). The motion was taken under advisement at the hearing held on January 12, 2006. Given the above decision concerning the motion to dismiss, the Court grants the motion to set trial as more fully described below.

IT IS ORDERED that a separate order will be entered consistent with this memorandum providing that Defendant All About Travel, Inc.'s motion to dismiss is denied; that the Plaintiff's claims against Defendant All About Travel, Inc relate back pursuant to Fed.R.Civ.P. 15(c) and are not time-barred; and that Defendant All About Travel, Inc. shall file an answer to Plaintiff's amended complaint on or before January 30, 2006; and that all parties in this adversary proceeding shall be ready to proceed to trial on February 13, 2006, at 9:00 a.m. (a date and time

certain), in the BANKRUPTCY COURTROOM, RUSSELL SMITH COURTHOUSE, 201 EAST BROADWAY, MISSOULA, MONTANA, unless the parties in all the Crop Hail adversary proceedings set for February 13, 2006, through February 15, 2006, agree by stipulation to a different trial sequence.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana